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IN THE COURT OF APPEALS OF INDIANA

IN RE the PATERNITY of L.R.R. b/n/f	)	
	)	
BRITTANY M. (RENNER) VERVILLE,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 82A01-0610-JV-428
	)	
BRIAN A. SIEBERS,	)	
	)	
Appellee.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Renee Allen Cain, Magistrate
Cause No. 82D01-0509-JP-452

April 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Brittany Verville ("Mother") appeals the trial court's custody order, granting Brian Siebers ("Father") joint custody of their daughter, L.S., and ordering that Father shall receive primary custody in the event of Mother's relocation.

We affirm in part and reverse in part.

ISSUES

1. Whether the trial court abused its discretion in awarding the parties joint custody of L.S.

2. Whether the trial court abused its discretion in ordering a prospective custody modification in the event Mother relocates.

3. Whether the trial court improperly denied Mother's petition to modify custody without a hearing.

FACTS

L.S. is the nonmarital child of Mother and Father.[1] Since L.S.'s birth, she has resided with Mother in Evansville. Father, who also resides in Evansville, has enjoyed frequent visitation with L.S. since her birth.

L.S. has been a patient at Riley Hospital for Children "[s]ince she was four days old," recently undergoing surgery to repair a cleft palate. (Tr. 39). L.S. also has been under the care of a cardiologist due to "two heart murmurs," as well as a developmental pediatrician, who "makes sure that [L.S.]'s developing as she should[.]" (Tr. 57, 56).

On September 22, 2005, when L.S. was approximately eight months old, Father filed a petition to establish paternity. On March 15, 2006, the parties requested a hearing

[1] The parties do not indicate L.S.'s date of birth. During the custodial hearing on June 21, 2006, Mother testified that L.S. was seventeen months old.

to determine custody of L.S. and L.S.'s surname. The trial court scheduled a hearing for June 21, 2006.

On June 10, 2006, Mother married Christopher Verville ("Stepfather"), who resides and owns a business in St. Petersburg, Florida. Mother informed Father that she planned on relocating to Florida and wished to take L.S. with her. In the event of her move, Mother offered Father visitation with L.S. "once every couple months . . . for a week." (Tr. 38).

The trial court held a hearing on Father's petition on June 21, 2006. Mother testified that DNA tests confirmed that Father was the father of L.S. Mother testified that if she relocated to Florida, she intended to visit Evansville often, as both she and Stepfather have extended family in Evansville. Mother also testified that if she and L.S. were to move to Florida, she planned on staying home with L.S.

Father testified that Mother "has been the primary care giver." (Tr. 60). Father also testified that he believed the parties should have joint custody if Mother remained in Evansville but wanted primary custody in the event Mother relocated to Florida. Father, as the owner and manager of a bar, has flexible working hours and testified that if he received primary custody of L.S., he would rely on both his and Mother's extended family to care for L.S. while he worked.

Regarding visitation, Father testified that he "see[s] [L.S.] generally about four times a week," and that he "saw [L.S.] . . . a total of twenty days in April" and nineteen days in May. (Tr. 44, 46). Mother testified that she "agree[d] that [Father] has [L.S.] between two and sometimes four days a week," but when Father "says twenty days he

might be saying he saw [L.S.] twenty times that month. But it's not that he had [L.S.] twenty days of the whole month." (Tr. 103-04).

Mother testified that Father "is a good dad," and that "[L.S.] enjoys spending time with her father." (Tr. 8, 9). Mother also testified that she "wanted to make sure [L.S. and Father] maintain a very close relationship . . . ." (Tr. 19). During the hearing, Father testified that he believed that Mother and Father should have equal time with L.S. Father also agreed that Mother has provided L.S. with good care.

Following the hearing on June 21, 2006, the parties agreed that L.S.'s surname would be changed to "Siebers." On July 11, 2006, the trial court entered the following order:

> 1. That the Mother and Father shall have joint physical custody of the parties' minor child.
>
> 2. If the Mother moves from the State of Indiana the Father shall have primary physical custody and the Mother shall have parenting time in accordance with the Indiana Parenting Time Guidelines or as agreed to by the parties.

(App. 1).

On August 9, 2006, Mother filed a motion to correct error, alleging, inter alia, that the trial court applied the wrong standard; the evidence did not support a change in custody; and that the custody order jeopardized L.S.'s insurance coverage. Although Mother did not argue the issue of insurance coverage at trial, Mother asserted in support of her petition to modify custody that physical custody of L.S. should be restored to her as Mother could maintain health insurance coverage for L.S. through Stepfather's health insurance only if L.S. resided primarily in Mother's household, and Father would not be

able to obtain health insurance for L.S. due to L.S.'s pre-existing conditions and would not qualify for state-funded insurance.

Father sought a continuance of the August 28, 2006 hearing on Mother's motion and petition, which the trial court granted over Mother's objection. The trial court set a new hearing for September 7, 2006. Father filed his response on September 1, 2006, requesting that the motion to correct error and petition to modify custody be denied without a hearing and that the hearing scheduled for September 7, 2006 be vacated. Father argued that the trial court did not modify custody; Mother's motion to correct error was based upon facts not in evidence; and that "[h]ealth insurance . . . is not a proper grounds for a modification of custody." (App. 25). On September 6, 2006, the trial court denied Mother's motion to correct error and vacated the hearing on said motion.

Mother timely filed a notice of appeal on October 4, 2006. On October 6, 2006, Mother filed an amended notice of appeal and motion to stay the trial court's July 11 order pending her appeal. Mother sought the stay because L.S.'s health insurance would be terminated if Mother were no longer the primary custodian of L.S., and Father had "indicated that he is not able to secure insurance" for L.S. (App. 36). Mother also sought the stay because although Father had "relocated to a new home with an undisclosed female," he had failed to provide notice of a change in his residence pursuant to Indiana Code sections 31-14-13-10 and 31-17-2.2-1. (App. 37).

The trial court granted Mother's motion to stay on October 11, 2006. Father then filed a motion to rescind the trial court's October 11 order, which the trial court granted.

On October 25, 2006, Mother filed a motion to stay the trial court's order pending appeal with this court, to which Father objected. On December 4, 2006, a panel of this court granted Mother's motion to stay the trial court's July 11 order, "pending resolution of this appeal." (App. 125).

DECISION

1. Joint Custody

Mother contends that by ordering joint custody, the trial court "effectively modified custody," and in doing so, applied the incorrect standard. Mother's Br. 11. Mother further contends that the trial court erred when it ordered joint custody.

a. *Determination of custody standard*

Mother argues that the trial court should have used the custody modification standard instead of the initial custody determination standard. In an initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered. *Apter v. Ross*, 781 N.E.2d 744, 757-58 (Ind. Ct. App. 2003), *trans. denied*. Accordingly, the petitioner must show "a change in circumstances so decisive in nature as to make a change in custody necessary for the welfare of the child." *In re Paternity of Winkler*, 725 N.E.2d 124, 127 (Ind. Ct. App. 2000).

Indiana Code section 31-14-13-1 provides that "[a] biological mother of a child born out of wedlock has sole legal custody of the child, unless a statute or court order provides otherwise . . . ." Indiana Code sections 31-14-13-2 provides that the trial court shall make an initial custody determination in a paternity case by looking at all relevant

factors, such as those listed in subsections (1) through (8) of the statute, to determine the best interests of the child. Indiana Code section 31-14-13-6, which governs modification of a child custody order in a paternity action, provides:

> The court may not modify a child custody order unless:
>
> (1) modification is in the best interest of the child; and
>
> (2) there is a substantial change in one (1) or more of the factors that the court may consider under section 2 and, if applicable, section 2.5 of this chapter.

Relying on *Winkler*, Mother argues the trial court should have used the stricter modification standard because "Father . . . had accepted the custody arrangement with the Mother being the custodial parent"; "[t]he evidence established that since [L.S.]'s birth, the Mother has been the child's primary care provider"; and "[s]ince [L.S.]'s birth, she has lived with the Mother exclusively." Mother's Br. 13. The facts of *Winkler*, however, distinguish it from the one at hand.

In *Winkler*, the mother always had custody of the parties' child, and the child had lived with the mother ten out of the child's twelve years when the father filed a petition to establish paternity and custody. We found that although there was no legal initial custody determination, the custody modification standard was appropriate because the father had long acquiesced to the mother's physical custody of the child. 725 N.E.2d at 128.

Here, Mother had sole custody of L.S. pursuant to Indiana Code section 31-14-13-1 at the time Father filed his petition to establish paternity. Mother, however, had had sole custody of L.S. for only eight months when Father filed his petition, and during this

time, Father exercised frequent visitation with L.S. Given these facts, we cannot say that Father acquiesced to Mother's custody.

Rather, we find this case analogous to *Hughes v. Rogusta*, 830 N.E.2d 898 (Ind. Ct. App. 2005). In *Hughes*, this court found no acquiescence where there was no prior court determination concerning custody, and the father immediately filed to establish paternity and determine custody after the mother moved out of the family residence with the child. 830 N.E.2d at 901. Thus, we find the trial court did not err in applying the initial determination of custody standard.

b. *Award of joint custody*

Mother asserts that the trial court erred in modifying custody. The trial court, however, did not modify custody. Rather, it made an initial determination of custody and awarded the parties joint custody of L.S.

A trial court's custody determination is afforded considerable deference as it is the trial court that sees the parties, observes their conduct and demeanor and hears their testimony. *Trost-Steffen v. Steffen*, 772 N.E.2d 500, 509 (Ind. Ct. App. 2002), *trans. denied*. Thus, on review, we will not reweigh the evidence, judge the credibility of witnesses or substitute our judgment for that of the trial court. *Id*. We will reverse the trial court's custody determination only if it is clearly against the logic and effect of the facts and circumstances or the reasonable inferences drawn therefrom. *Id.*

Regarding the determination of initial custody in a paternity proceeding, Indiana Code section 31-14-13-2 provides as follows:

> The court shall determine custody in accordance with the best interests of the child. In determining the child's best interests, there is not a presumption favoring either parent. The court shall consider all relevant factors, including the following:
>
> (1) The age and sex of the child.
> (2) The wishes of the child's parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parents;
> (B) the child's siblings; and
> (C) any other person who may significantly affect the child's best interest.
> (5) The child's adjustment to home, school, and community.
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

Where, as here, a trial court is making an initial custody determination, it is required to consider all evidence from the time of child's birth in determining the custody arrangement that would be in the best interest of child. *Hughes*, 830 N.E.2d at 902.

Testimony demonstrates that L.S. has had the benefit of a close and caring relationship with Mother and Father, both of whom desired that L.S. maintain a strong relationship with the other. Furthermore, L.S., Mother and Father have had the support of extended family. Based on the evidence before us, we do not find that the trial court erred in awarding Mother and Father joint custody.

2. Future Custody Modification

Mother asserts that the trial court erred in granting an automatic change of custody prospectively upon her future relocation out of state. We agree.

"[A] trial court may not prospectively order an automatic change of custody in the event of any significant future relocation by" Mother. *See Bojrab v. Bojrab*, 810 N.E.2d 1008, 1012 (Ind. 2004). Although language declaring that a present award of custody is conditioned upon the continuation of a child's place of residence is proper as "a determination of present custody under carefully designated conditions," language ordering that custody shall be automatically modified in the event of one parent's relocation "is inconsistent with the requirements of the custody modification statute[.]" *Id.* As the Indiana Supreme Court explained:

> There is a significant difference between the two phrases. One purports to automatically change custody upon the happening of a future event; the other declares that the present award of custody is conditioned upon the continuation of the children's place of residence. While the automatic future custody modification violates the custody modification statute, the conditional determination of present custody does not.

Id.

Again, in this case, the trial court's order provided as follows:

> If the Mother moves from the State of Indiana the Father shall have primary physical custody and the Mother shall have parenting time in accordance with the Indiana Parenting Time Guidelines or as agreed to by the parties.

(App. 1). We find that this violates Indiana Code section 31-14-13-6, and we therefore reverse the trial court's order as to the prospective modification of custody.

3. Denial of Petition

Mother asserts the trial court erred when it denied her petition to modify custody without a hearing. We disagree.

Here, Mother filed a motion to correct error and, in the alternative, a petition to modify custody. In her motion to correct error, Mother maintained that the trial court's order jeopardized L.S.'s health insurance coverage because "[a]ny change to the Mother's custody of [L.S.] would therefore result in [L.S.] being removed from [Stepfather's] insurance plan," and "[i]f custody is changed to [Father], he would likewise not be able to obtain an individual health insurance policy for [L.S.] given her preexisting medical conditions." (App. 14). Mother reiterated this argument in her petition to modify custody.

Although Mother captioned her petition as one to modify custody, we find that it was more akin to a motion to reconsider. The trial court, however, had already entered its final judgment. Therefore, the trial court "no longer had the power to rule on such a motion." *Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998) (finding that, under Indiana Trial Rule 53.4, a trial court may only consider a motion to reconsider pre-judgment). "Accordingly, although substantially the same as a motion to reconsider, a motion requesting the court to revisit its final judgment must be considered a motion to correct error." *Id.* We find this particularly appropriate in this case where Mother's motion to correct error raises the same argument as Mother's self-captioned petition to modify custody. *See In re Sale of Real Prop. with Delinquent Taxes or Special Assessments*, 822 N.E.2d 1063, 1069 (Ind. Ct. App. 2005) ("We have often indicated a preference of substance over form."), *trans. denied*.

Regarding motions to correct error, we have "'long and consistently held that a trial court is not required to hold an evidentiary hearing on a motion to correct error.'" *In*

re Estate of Wheat, 858 N.E.2d 175, 185 (Ind. Ct. App. 2006) (quoting *Ortiz v. State*, 766 N.E.2d 370, 376 (Ind. 2002)). We therefore find no error in denying Mother's motion without a hearing.

Affirmed in part and reversed in part.

KIRSCH, J., and MATHIAS, J., concur.